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In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 710

JOHN C. PALMER by JEAN M. PALMER, his guardian *ad litem*, *Petitioner*,

vs.

WATERMAN STEAMSHIP CORPORATION, a corporation, *Respondent*.

BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

FRANCIS L. TETREAULT
310 Sansome Street
San Francisco 4, California

DONALD S. VOORHEES
1411 Fourth Avenue Building
Seattle 1, Washington
Attorneys for Respondent

THE ARGUS PRESS, SEATTLE

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No. 710

BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

To the Honorable, The Supreme Court of the United States:

COMES NOW respondent and submits this brief in opposition to the issuance of a writ of certiorari in this cause to the Supreme Court of the State of Washington.

QUESTIONS FOR REVIEW.

Petitioner has framed three questions as being the ones which he seeks to have reviewed by this court. We respectfully suggest that the ultimate question upon which he seeks review is the following:

> 1. If, at a time when he is off-duty, a member of the crew of a vessel voluntarily undertakes to render assistance to an intoxicated shipmate, is the negligence, if any, of the one rendering assistance imputed as a matter of law to his employer, the shipowner?

As pointed out in Section II of the Argument of this brief, this federal question was never reached in the

state courts so as to make that question now reviewable by this court.

STATEMENT OF THE CASE

(The abbreviation "St." will be used to refer to the Statement of Facts and "Supp. St." will be used to refer to the Supplemental Statement of Facts, which have been certified to this court as a part of the Supplemental Record.)

Petitioner John C. Palmer, by his guardian *ad litem*, Jean M. Palmer, sued his employer, respondent Waterman Steamship Corporation, to recover damages in the sum of $200,000.00 for injuries which he sustained on August 22, 1955, on board the SS JOHN B. WATERMAN which was then alongside a dock in Seattle, Washington.

Palmer signed on the JOHN B. WATERMAN in San Francisco, California, on August 11, 1955, just eleven days before his injury. Between the time of his joining the vessel and the day of his injury, Palmer was twice observed on board the JOHN B. WATERMAN in a state of intoxication (St. 139-143; 269-272). Upon one occasion the officer on watch in the engine room believed Palmer to be incapable of standing his watch as a fireman by reason of intoxication and ordered him to go into the machine shop and "sleep it off" (St. 271-272).

Palmer was on watch in the engine room of the JOHN B. WATERMAN from the time that the vessel arrived in Seattle, Washington, at 2124 on August 21, 1955, until shortly before midnight of that day (St. 267). Despite the prohibitions of the Shipping Articles and the regulations of the vessel against having or drinking intoxicants aboard the vessel (Supp. St.: Coleman Dep. 37-

40; 86-87; 89; Patrick Dep. 10-11; 15-17). Palmer did become intoxicated on board the JOHN B. WATERMAN between the time that he came off watch and the time that he was injured at about 0305 on August 22, 1955.

A few minutes before 0305 on August 22, 1955, Donald Wood, the second assistant engineer, who was off-duty at the time, observed Palmer walking unsteadily on the weather deck of the vessel and went over to him (St. 346-349). Shortly thereafter Frank Koski, a member of the crew who was returning from liberty on shore and who was likewise off-duty, overheard Wood and Palmer and went over to give Palmer a hand in getting back to his quarters (Supp. St.: Koski Dep. 8).

Wood and Koski then walked with Palmer back to the house at the after end of the vessel. This after-house contained an athwartship passageway leading to a midship stairway which in turn led to the crew's quarters below. At the entrance to the athwartship passageway there was a coaming which was 15½ inches high. Palmer stepped over this coaming without help and without any difficulty (St. 355; Supp. St.: Koski Dep. 31). Koski, who was called by Palmer as a witness, testified that Palmer was not stumbling as he walked and that Palmer was able to walk without assistance so long as he had something with which to steady himself (Supp. St.: Koski Dep. 16; 21).

Koski testified that at the head of the stairway, Palmer indicated that he wanted to stay there and talk with Wood (Supp. St.: Koski Dep. 10), so Koski proceeded down the stairs to his quarters below. When he reached the bottom of the stairway, Koski looked back

and observed that Palmer was starting down. He testified that Palmer had hold of both handrails and that he was not swaying or doing anything that indicated that he was having any difficulty. He further testified that had Palmer been doing anything that indicated that he was having any difficulty, Koski would have gone back up the stairs and helped him (Supp. St.: Koski Dep. 32-33). Wood testified that at the head of the stairway either he or Koski asked Palmer if he was all right and that Palmer replied, "Sure, I am going to bed" or "I am okay." When Palmer started down the stairway, Wood observed that Palmer had both his hands on the handrails and that he was apparently proceeding down the stairs without difficulty (St. 355).

In his statement of the case, petitioner states (Pet. cert. 4):

> "Peterson, the gangway watchman on the vessel, observed Koski and Wood trying to pick up Palmer, who was then in a prone position, flat on his back apparently 'passed out' with his eyes completely closed."

It is true that Peterson so testified in a deposition taken on behalf of petitioner. Wood, however, expressly denied that Peterson was ever around to make any such observation (St. 363); and in his deposition, Koski at no time mentions the presence of Peterson. In addition the testimony of Peterson flatly contradicted a written and signed statement given by him on the day of the accident in which he stated that he had not seen Palmer at any time when he was on gangway watch prior to the accident (Supp. St.: Peterson Dep. 29, 30).

The trial of this cause before a jury consumed two

weeks of time. After deliberation the jury returned a verdict in favor of respondent. The trial judge denied petitioner's motion for a new trial. The Supreme Court of the State of Washington affirmed the judgment of the trial court and subsequently denied a rehearing to petitioner.

ARGUMENT

I.

There Is No Conflict Between the Decision of the Supreme Court of the State of Washington and the Decision of the Court of Appeals for any Circuit.

Rather than being in conflict with the decision of any United States Court of Appeals, the decision of which petitioner complains is in harmony with the decisions of both Courts of Appeals which have passed upon the question which petitioner seeks to bring before this court. Those two cases are:

McDonough v. Buckeye Steamship Company (N.D. Ohio 1951) 103 F.Supp. 473; (CA 6 1952) 200 F.(2d) 558; cert. den. 345 U.S. 926, 97 L.ed. 1357, 73 Sup.Ct. 785 (1953);

Robinson v. Northeastern Steamship Corporation (CA 2 1956) 228 F.(2d) 679; cert. den. 351 U.S. 937, 100 L.ed. 1465, 76 Sup.Ct. 834 (1956); pet. for rehearing den. 352 U.S. 860, 1 L.ed. (2d) 70, 77 Sup.Ct. 24 (1956).

In *McDonough v. Buckeye Steamship Company* the shipowner was held liable for the negligence of a seaman who had voluntarily undertaken to render assistance to an intoxicated shipmate. In that case, however, there was an established, recognized and invariable practice for assistance to be rendered to intoxicated crewmen at

the Great Lakes docks. In its opinion the trial court stated at 103 F.Supp. 475:

> "Olson (the Third Mate of the vessel) related that the customary and established practice — at the various Great Lakes docks — was for the dock guard to detain these men and either turn them over to a sober shipmate if one appeared or else call the ship. The officer in charge of the ship then would personally go ashore or would send someone else to assist the seaman. This procedure was known to defendant and was the accepted and recognized practice invariably followed."

The trial court then concluded at 103 F.Supp. 477:

> "Cox, in taking charge of Kerr, was acting in line with the well established and recognized practice known and acquiesced in by the defendant. Obviously therefore, that Cox was acting within the course and scope of his employment, so as to charge the defendant with liability, cannot be doubted."

This decision, imposing liability upon the shipowner, was affirmed in a *per curiam* opinion by the Court of Appeals for the 6th Circuit. Certiorari was thereafter denied by this court.

In *Robinson v. Northeastern Steamship Corporation* liability was not imposed upon the shipowner for the negligence of a crew member who had voluntarily undertaken to render assistance to an intoxicated shipmate. In that case, however, there was no established practice or custom. The Court of Appeals for the 2nd Circuit stated at 228 F.(2d) 681:

> "The case upon which the appellant relies, *Buckeye Steamship Company v. McDonough*, 6 Cir., 200 F.(2d) 558, cert. den. 345 U.S. 926, 73 S.Ct. 75, 97

L.ed. 1357, is readily distinguishable. There the shipowner was held liable for the death of a drunken seaman who was drowned when returning from shore leave, through the negligence of a shipmate who had undertaken to assist him to the vessel. In that case in assisting his shipmate the negligent sailor was acting in accordance with a long-standing custom, which had been recognized and approved by the shipowner, and consequently he was considered as acting within the scope of his employment. In the case at bar there was no proof that Woods' actions were requested or authorized by the defendant or were in accord with a custom recognized by the defendant. Without such authorization Woods was not acting within the scope of his employment, and his negligence, if any, in performing his voluntary undertaking could not be imputed to the defendant even if successful performance would further the interests of the shipowner."

Certiorari was then denied by this court, and subsequently the petitioner's request for rehearing was likewise denied by this court.

The issuance of a writ of certiorari in this cause would not serve the useful purpose of enabling this court to resolve a conflict in decisions, for there is simply no conflict which calls for resolution.

II.

The Federal Question Upon Which Petitioner Seeks Review Was Never Reached in the Trial Court or, if Reached, Was Waived Upon Appeal to the Supreme Court of the State of Washington.

From the three questions set forth by petitioner as being the ones upon which he seeks review (Pet. cert. 3),

it can be deduced that the ultimate federal question upon which he seeks review is the following:

> "If, at a time when he is off-duty, a member of the crew of a vessel voluntarily undertakes to render assistance to an intoxicated shipmate, is the negligence, if any, of the one rendering assistance imputed as a matter of law to his employer, the shipowner?"

Petitioner contends (Pet. cert. 6) that the federal question was reached by the trial court's refusing to give petitioner's Requested Instruction No. 17 and by the court's giving its Instruction No. 11.

It is the position of respondent that the federal question was never reached in the trial court or, if reached in the trial court, was waived by petitioner upon appeal to the Supreme Court of the State of Washington.

1. The Federal Question was not Reached by the Trial Court's Refusing to Give Respondent's Requested Instruction No. 17.

In his petition, petitioner states (Pet. cert. 6):

> "It was petitioner's position throughout the trial, that when Palmer was found on the vessel in a helpless condition and unable to look out for his own safety, even though the helplessness was caused by intoxication; the vessel and the other crew members owed Palmer the duty to use reasonable care to assist Palmer to his quarters or to a place of safety where he would not be harmed by reason of his inability to protect himself. This obligation was due Palmer because he was a seaman and engaged in maritime employment. Under this theory, when Wood and Koski attempted to assist Palmer to his quarters, they were acting in the course of their employment for the vessel, and not as volunteers."

The record reveals, however, that throughout the trial petitioner took the position that the negligence, if any, of respondent's employees, Wood and Koski, was to be imputed to respondent not as a matter of law but by reason of the fact that Wood and Koski were allegedly acting pursuant to a recognized custom or practice of the vessel. That this was in fact petitioner's position at time of trial is shown by the following:

1. In his Second Amended Complaint (Tr. 1-4), the pleading upon which the case was tried, petitioner alleged in paragraph III thereof:

> "That plaintiff's superior officer observed the plaintiff and one of his fellow crew members observed the plaintiff in such condition and *in accordance with the usual and customary practice,* proceeded to assist plaintiff to safely return to his quarters." (Italics ours.)

2. The only legal memorandum submitted by petitioner to the trial court was his Memorandum on Plaintiff's Motion for Summary Judgment (Supp. R. 1). In that memorandum petitioner stated at page 2:

> "It also appears from these depositions that there is no dispute that a duty to help a sick and helpless seaman has been established *as the custom of the vessel* and such duty which is imposed upon all crew members." (Italics ours.)

On page 3 of that memorandum petitioner stated:

> "*A case directly in point on all of the facts and which applies the law is Buckeye Steamship Co. v. McDonough,* (D.C. Ohio) 1951 A.M.C. 2042, 103 F.Supp. 473, aff'd (C.C.A. 6th) 1935 A.M.C. 343
>
> . . . .
>
> "The case was tried in the lower court without

a jury (103 F.Supp. 473, 1951 A.M.C. 2042). That court held that leaving the decedent unattended in a place of danger and the failure to call for immediate help constituted actionable negligence for which the shipowner was liable. The court further held that a seaman who was assisting the decedent was in the course of his employment and acting in furtherance of his employer's interest in view of the practice of the dock guard to stop drunken seamen at the gate and not to allow them to proceed unaccompanied. *There was testimony in that case, as in the case at bar, that such was the established practice.*

"The lower court's opinion discussed the precarious position in which the decedent was permitted to remain and commented *upon the customary and established* practice to assist a seaman to a place of safety when they return to the vessel in an intoxicated condition." (Italics ours.)

On Page 8 of that memorandum petitioner stated with respect to *Robinson v. Northeastern Steamship Corporation* (CA 2 1956) 228 F.(2d) 679, cert. den. 351 U.S. 937, 100 L.ed. 1465, 76 Sup. Ct. 834, (1956) as follows:

"The court distinguished the facts in this case from that of *Buckeye S.S. Co. v. McDonough* (*supra*) where the assistance there rendered by the negligent sailor was *in accord with a long-standing custom which had been recognized and approved by the shipowner and consequently the negligent sailor was considered within the scope of his employment.* Reference is made to the testimony in the *McDonough* case which established this recognized custom and practice. *The similarity of such testimony to that of the case at bar is obvious.*" (Italics ours.)

3. By his Requested Instruction No. 10 (Supp. R. 22).

petitioner specifically requested the trial court to instruct the jury that respondent's liability for the acts of Wood and Koski depended upon whether those two men were acting in accordance with an established and recognized practice or custom on board the JOHN B. WATERMAN. This instruction was as follows:

> "If you find from the evidence that there was an *established and recognized practice or custom on board the* SS JOHN B. WATERMAN for its crew members and officers to assist any other crew member who is in a disabled condition by reason of intoxication or any other cause and thereby incapable of looking out for his own safety, and to assist said crew members to his quarters or other place of safety, and if you further find from the evidence that Engineer Wood and Frank Koski were assisting the plaintiff John C. Palmer *in accordance with such practice or custom,* then I instruct you that Engineer Wood and Frank Koski in assisting John C. Palmer were acting in the course and scope of their employment for the defendant, Waterman Steamship Corporation, at that time." (Italics ours.)

At no time during the trial of this cause did petitioner withdraw his Requested Instruction No. 10.

4. Throughout the course of the trial, counsel for petitioner asked questions of every seafaring witness with respect to the custom or practice on board the JOHN B. WATERMAN of crew members rendering assistance to intoxicated shipmates. If, as petitioner now contends, negligence was to be imputed to respondent as a matter of law, all of those questions were completely irrelevant and could only have misled the trial court as to petitioner's theory of liability.

5. Petitioner at no time requested the trial court to charge the jury that respondent was liable as a matter of law for the negligence, if any, of its employees, Wood and Koski. Such request would have been in these or similar words:

> "I instruct you as a matter of law that a member of a ship's crew is acting within the scope of his employment when he undertakes to render assistance to an intoxicated shipmate. If you find therefore that Donald Wood and Frank Koski undertook to render assistance to plaintiff at a time when plaintiff was intoxicated, then defendant Waterman Steamship Corporation is liable for any negligence of Donald Wood and Frank Koski in rendering that assistance to plaintiff."

Petitioner's Requested Instruction No. 17 was no such request, for had the trial court given that instruction, it still would have had to instruct the jury with respect to the imputation of negligence to respondent.

Moreover, the trial court did in fact charge the jury upon the very issues suggested by petitioner's Requested Instruction No. 17. The first sentence of the requested instruction was as follows:

> "I instruct you that under the law *and facts* in this case there is a duty on the part of the officers and crew of the SS JOHN B. WATERMAN to exercise reasonable care to escort and assist a fellow crew member of that vessel when on board and in a helpless condition by reason of intoxication." (Italics ours.)

This sentence simply reiterates the contention made in petitioner's pre-trial motion for summary judgment to the effect that a duty to assist petitioner had been

established by an allegedly uncontroverted proof of custom and practice on board the JOHN B. WATERMAN. (As pointed out by the Supreme Court of the State of Washington, however, the testimony upon this point was conflicting so that the issue was properly submitted to the jury.)

This sentence of the instruction also speaks upon the standard of care to which the actors are held, *i.e.*, to exercise reasonable care. That standard of care was, however, covered by the trial court in its Instruction No. 7 which charged the jury as follows:

> "Negligence is the failure to exercise reasonable and ordinary care, and by the term 'reasonable and ordinary care' is meant that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances or conditions." (Appendix B)

The second sentence of the requested instruction was as follows:

> "I further instruct you in determining whether or not a seaman was in such condition as to require the assistance to which I have heretofore referred, you shall consider his condition with relation to the circumstances existing around said seaman and the place where he was found, at the time he was observed by the officers or men in such condition."

This aspect of the requested instruction was fully covered by the trial court in its Instructions Nos. 12A and 14. Instruction No. 12A was as follows:

> "I instruct you that the conduct of Frank Koski and Donald Wood with respect to plaintiff is to be judged, not by the actual state of sobriety or intoxication of plaintiff at the time Frank Koski

and Donald Wood were accompanying him, but rather by his state of sobriety or intoxication as then would have appeared to reasonably prudent men in the situation and circumstances of Frank Koski and Donald Wood." (Appendix C)

Instruction No. 14 was as follows:

"I instruct you that the term 'helpless,' used in these instructions, refers, in the normal meaning of the word, to the inability of a member of the crew to care for his own safety on board of the vessel in view of the conditions existing on board said vessel at that time." (Appendix D)

Having given its Instructions Nos. 7, 12A, and 14, the trial court would have had every reason to believe that it had fully covered the issues upon which petitioner had requested instruction by its Requested Instruction No. 17. The trial court had no way of divining that petitioner was requesting the court, as he now contends, to instruct the jury that the negligence, if any, of respondent's employees was to be imputed as a matter of law to respondent. It was not put on notice by petitioner's Requested Instruction No. 17 that petitioner had adopted an entirely new and different theory of imputed liability:

2. The Federal Question, if Reached by the Trial Court's Giving Instruction No. 11, Was Waived Upon Appeal to the Supreme Court of the State of Washington.

At the time of trial the court instructed the jury by its Instruction No. 11 that respondent was not liable for the acts of its employees, Wood and Koski, in rendering assistance to Palmer, unless the jury found that there was a custom or practice, known to respondent, for mem-

bers of the crew of the JOHN B. WATERMAN to assist other members of the crew who were intoxicated.

The court was fully justified in giving that instruction because petitioner had himself requested its equivalent by his Requested Instruction No. 10 (Supp. R. 22). The court's instruction was based squarely upon the holdings in *McDonough v. Buckeye Steamship Company* (N.D. Ohio 1951) 103 F.Supp. 473; (CA6 1952) 200 F.(2d) 588; cert. den. 345 U.S. 926, 97 L.ed. 1357, 73 Sup.Ct. 785 (1953) and *Robinson v. Northeastern Steamship Corporation* (CA2 1956) 228 F.(2d) 679; cert. den. 351 U.S. 937, 100 L.ed. 1465, 76 Sup.Ct. 834 (1956); pet. for rehearing den. 352 U.S. 860, 1 L.ed. (2d) 70, 77 Sup.Ct. 24 (1956).

It is self-evident that if the trial court was in error in giving its Instruction No. 11, that error was plainly invited by petitioner when he submitted his Requested Instruction No. 10.

Moreover, upon his appeal to the Supreme Court of the State of Washington petitioner stated his sole ground for appeal from the giving of Instruction No. 11 in the following words (Supp. R. 30; App. Brief 52):

> "The court committed error in the giving of Instruction No. 11 which charged the jury:
>
> [here the instruction was set out]
>
> such definition of practice or custom is incorrect because it requires the jury to find that the custom was followed without variance and not generally and that the custom or practice must be followed every time before such duty could be established."

This assignment of error was in compliance with Rule

43 of the Rules on Appeal promulgated by the Supreme Court of the State of Washington which provides as follows:

> "No alleged error of the superior court will be considered by this court unless the same be definitely pointed out in the 'assignments of error' in appellant's brief . . . "

The Supreme Court of the State of Washington disposed of that assignment of error by correctly pointing out that the appellant made no such objection to the instruction at the time of trial and that he could not make such objection for the first time upon appeal (Pet. cert. 18).

Appellant chose to appeal to the Supreme Court of the State of Washington solely upon the ground that the word "invariable" should not have been included in the instruction. Having so chosen, he thereby abandoned any other possible errors in that instruction.

Ennis v. Ring, 49 Wn.(2d) 284, 300 P.(2d) 773 (1956);

Erdmann v. Henderson, 50 Wn. 2d) 296, 311 P.(2d) 423 (1957).

He cannot now be heard to say that the giving of that instruction reached the federal question upon which he now seeks review inasmuch as he did not bring that question before the Supreme Court of the State of Washington for decision.

III.

This Case Was Disposed of by the Supreme Court of the State of Washington Upon a Non-Federal Ground Which Was Sufficient in and of Itself to Sustain the Judgment.

No principle has been more firmly established by this court than that it will not review the judgment of a state court if that judgment rests upon a non-federal ground sufficient in and of itself to sustain the judgment.

In *Fox Film Corporation v. Muller*, 296 U.S. 207, 80L.ed. 158 (1935) this court stated at 296 U.S. 210, 80 L.ed. 159:

> " . . . the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. This rule had become firmly fixed at least as early as *Klinger v. Missouri*, 13 Wall. 257, 263, 20 L.ed. 635, 637, and has been reiterated in a long line of cases since that time."

In the case of *Lynch v. People of the State of New York*, 293 U.S. 52, 79 L.ed. 191 (1934) this court stated at 293 U.S. 54, 79 L.ed. 193:

> "It is essential to the jurisdiction of this court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented to the highest court of the state having jurisdiction but that its decision of a federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. (Cases cited.)

> Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction."

By petitioning for a writ of certiorari, petitioner seeks an opportunity to try to persuade this court to hold that a shipowner is liable as a matter of law for the negligence, if any, of a crew member who voluntarily undertakes to render assistance to an intoxicated shipmate.

By affirming the trial court's Instruction No. 11, however, the Supreme Court of the State of Washington has already held that the imputation of negligence to the shipowner is dependent upon the existence of a recognized custom or practice of rendering such assistance. That holding was based entirely upon a state ground.

At the time of trial petitioner took exception to the giving of Instruction No. 11 in these words (R. 33):

> "Plaintiff excepts to the court's giving of Instruction No. 11, where the court makes it as an issue whether or not a custom or practice to care for helpless seaman exists, which instruction reads as follows:
>
> [here the instruction was set out]
>
> on the ground and for the reason stated in my motion to direct the jury to find such custom and practice as a matter of law and does not apply to maritime law."

(It is to be particularly noted that in this exception, taken on the final day of trial, petitioner was still speaking in terms of "custom and practice.")

As pointed out in the preceding section of this brief, petitioner's only assignment of error to the Supreme Court of the State of Washington with respect to the trial court's giving Instruction No. 11 was in these words:

> "The court committed error in the giving of Instruction No. 11 which charged the jury:
>
> [here the instruction was set out]
>
> such definition or practice or custom is incorrect because it requires the jury to find that the custom was followed without variance and not generally and that the custom or practice must be followed every time before such duty could be established."

The Supreme Court of the State of Washington sustained the giving of that instruction in these words (Pet. cert. 18):

> "Appellant assigns as error the submission to the jury of the issue of whether or not there was an 'invariable' custom under which the shipowner owed a duty of care to an intoxicated seaman. The testimony of this point was conflicting and appellant now objects to the word 'invariable' in the instruction. No such objection was made at the time the instruction was submitted to the jury. It cannot be raised later for the first time."

The Supreme Court of the State of Washington was compelled to so hold by its many prior holdings that an appellant will not be heard to appeal from the giving of an instruction upon a ground which he did not call to the attention of the trial court.

Peterson v. King County, 45 Wn.(2d) 860, 278 P.(2d) 774 (1954);

Sigurdson v. City of Seattle, 48 Wn.(2d) 155, 292 P.(2d) 214 (1956).

By sustaining the trial court in the giving of Instruction No. 11, the Supreme Court of the State of Washington has ruled upon a non-federal ground (the failure by petitioner to comply with applicable state appellate procedure) that Instruction No. 11 was invulnerable upon appeal. It has thereby held that the trial court properly charged the jury that respondent was not liable for the acts of Donald Wood and Frank Koski unless those men were acting pursuant to a recognized practice or custom of assisting intoxicated crewmen.

This holding makes futile the issuance of a writ of certiorari in this cause inasmuch as the Supreme Court of the State of Washington has thereby completely disposed of the question upon which petitioner seeks review upon a non-federal ground sufficient in and of itself to sustain the judgment.

Should this court issue a writ of certiorari in order to review the refusal by the trial court to give petitioner's Requested Instruction No. 17, it would find that it could not hold that the trial court had erred in refusing to give that instruction without at the same time holding that the Supreme Court of the State of Washington was in error in holding (upon a non-federal ground), that there was no error in the giving of Instruction No. 11.

If this court should leave undisturbed the holding of

the Supreme Court of the State of Washington with respect to the trial court's Instruction No. 11 but should hold that the trial court was in error in its failure to give Requested Instruction No. 17, the trial court upon re-trial would be left in a position where it could not at one and the same time adhere to the decision of the Supreme Court of the State of Washington and to that of this court. This, because the trial court's Instruction No. 11, already sustained upon a non-federal ground, is in irreconcilable conflict with petitioner's Requested Instruction No. 17. The former tells the jury that liability can be imputed to respondent only if Donald Wood and Frank Koski were acting pursuant to a recognized practice and custom of rendering assistance to intoxicated shipmates. The latter (if petitioner's present interpretation of that request be accepted) tells the jury that respondent is liable as a matter of law for the acts of its employees irrespective of any practice or custom. Such contradictory instructions could not be given to a jury.

The trial court upon re-trial would be compelled by a long line of Washington decisions to give Instruction No. 11 again, for instructions which have been sustained upon appeal become thereby the "law of the case" and must be given upon re-trial.

Kennett v. Yates, 45 Wn.(2d) 35, 272 P.(2d) 122 (1954);

Columbia Steel Company v. State of Washington, 34 Wn.(2d) 700, 209 P.(2d) 482 (1949);

Miller v. Sisters of St. Francis, 5 Wn.(2d) 204, 105 P.(2d) 32 (1940).

It would be in consequence a futile thing for this court to review the trial court's failure to give petitioner's Requested Instruction No. 17 unless this court is prepared to set aside the holding by the Supreme Court of the State of Washington, upon an exclusively non-federal ground, that the trial court did not err in giving its Instruction No. 11.'

CONCLUSION

We therefore respectfully urge that a writ of certiorari not be issued in this cause to the Supreme Court of the State of Washington.

Respectfully submitted,

FRANCIS L. TETREAULT
DONALD S. VOORHEES
Attorneys for Respondent

APPENDIX A

PETITIONER'S REQUESTED INSTRUCTION NO. 10 (Supp. R. 22)

If you find from the evidence that there was an established and recognized practice or custom on board the SS "JOHN B. WATERMAN" for its crew members and officers to assist any other crew member who is in a disabled condition by reason of intoxication or any other cause and thereby incapable of properly looking out for his own safety, and to assist said crew member to his quarters or other place of safety, and if you further find from the evidence that Engineer Wood and Frank Koski were assisting the plaintiff JOHN C. PALMER in accordance with said custom or practice, then I instruct you that Engineer Wood and Frank Koski in assisting John C. Palmer were acting in the course and scope of their employment for the defendant, WATERMAN STEAMSHIP CORPORATION, at that time.

McDonough v. Buckeye Steamship Co., 103 F. Supp. 473, 1951 A.M.C. 2042, aff'd (CCA 6) 1953 A.M.C. 343.

APPENDIX B

TRIAL COURT'S INSTRUCTION NO. 7 (in part)
(Statement of Facts 441)

"Negligence" is the failure to exercise reasonable and ordinary care, and by the term "reasonable and ordinary care" is meant that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances or conditions.

APPENDIX C

TRIAL COURT'S INSTRUCTION NO. 12A
(Statement of Facts 444)

I instruct you that the conduct of Frank Koski and Donald Wood with respect to plaintiff is to be judged, not by the actual state of sobriety or intoxication of plaintiff at the time Frank Koski and Donald Wood were accompanying him, but rather by his state of sobriety or intoxication as then would have appeared to reasonably prudent men in the situation and circumstances of Frank Koski and Donald Wood.

APPENDIX D

TRIAL COURT'S INSTRUCTION NO. 14
(Statement of Facts 445)

I instruct you that the term "helpless," used in these instructions, refers, in the normal meaning of the word, to the inability of a member of a crew to care for his own safety on board of the vessel in view of the conditions existing on board said vessel at that time.

APPENDIX E

RULE 43 OF THE RULES OF APPEAL OF THE SUPREME COURT OF THE STATE OF WASHINGTON (Rules of Court Revised Code of Washington Vol 0)

No alleged error of the superior court will be considered by this court unless the same be definitely pointed out in the "assignments of error" in appellant's brief. In appeals from all actions at law or in equity tried to the court without a jury, the findings of fact made by the court will be accepted as the established facts in the case unless error is assigned thereto. No error assigned to any finding or findings of fact made or refused will be considered unless so much of the finding or findings as is claimed to be erroneous shall be set out verbatim in the brief. No error assigned to the inclusion, omission, sufficency, or insufficiency of an instruction or instructions, given or not given, will be considered unless such instruction or instructions, as the case may be, shall be set out in the brief in full. *Provided,* That the objection that the superior court had no jurisdiction of the cause or that the complaint does not state sufficient facts to constitute a cause of action, or that the supreme court has no jurisdiction of the appeal, may be taken at any time.

APPENDIX F

PETITIONER'S ASSIGNMENT OF ERROR NO. 3 TO THE SUPREME COURT OF THE STATE OF WASHINGTON

(Supp. R. 30: Brief of Appellant 52)

The court committed error in the giving of Instruction No. 11 which charged the jury:

> "I instruct you that defendant is not liable for the acts of Frank Koski and Donald Wood in rendering assistance to plaintiff unless you find that there was on board the 'JOHN B. WATERMAN' a practice or custom which was invariably followed and which was known to or should have been known in the exercise of reasonable care to the Master of the ship owned by the defendant and which was for the benefit of the shipowner."

such definition of practice or custom is incorrect because it requires the jury to find that the custom was followed without variance and not generally and that the custom or practice must be followed every time before such duty could be established.